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80-6258

IN THE

SUPREME COURT OF THE UNITED STATES

SPRING TERM, 1981

No.

ROBERT CHARLES DRUCKER

Petitioner

vs.

SECURITIES AND EXCHANGE COMMISSION et al.

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Robert C. Drucker, Pro Se

100 Beekman Street

N.Y., N.Y. 10038

(212) 285-0955

80-5258

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IN THE MATTER OF
ROBERT C. DRUCKER, PETITIONER
vs.
SECURITIES AND EXCHANGE COMMISSION ET AL,
RESPONDENT(s)

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(H) -AFFIDAVIT OF PETITIONER'S FORMER ATTORNEY, DAVID M. BUTOWSKY

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IN THE SUPREME COURT OF THE UNITED STATES

Spring Term, 1981

DOCKET No._____

ROBERT C. DRUCKER,	:
Petitioner	:
vs.	:
SECURITIES AND EXCHANGE COMMISSION ET. AL.	:
Respondents	:

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS Pursuant to Rule 46(1) of the Rules of this Court, Petitioner, ROBERT C. DRUCKER, ask leave to file his Petition for Writ of Certiorari to the Supreme Court of the United States WITHOUT prepayment of costs and to proceed in forma pauperis. The Petitioner's affidavit In Support of this Motion is attached hereto.

DATED, FEBRUARY 26, 1981

ROBERT C. DRUCKER, Pro Se
100 Beekman Street Suite 18J
New York, N.Y. 10038
Ph. (212) 285-0955

BY _____
ROBERT C. DRUCKER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion for Leave to Proceed In Forma Pauperis, together with the Affidavit in support thereof, was mailed to Stephen Hammerman, Esq., Securities & Exchange Commission, 26 Federal Plaza, N.Y., N.Y. 10007 on this 26 day of February, 1981.

DATED February 26, 1981

ROBERT C. DRUCKER
100 Beekman Street 18J
N.Y., N.Y. 10038
(212) 285-0955

IN THE SUPREME COURT OF THE UNITED STATES

Spring Term, 1981

DOCKET No. 80-6258

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ROBERT C. DRUCKER,	:
Petitioner	:
vs.	:
SECURITIES AND EXCHANGE COMMISSION ET. AL.	:
Respondents	:

STATE OF NEW YORK)
COUNTY OF QUEENS) ss

I, ROBERT C. DRUCKER, being first duly sworn, according to law, depose and say that I am the Petitioner in the above titled cause, and in support of my application for Leave to Proceed without being required to prepay costs and fees, state:-

1. -Because of my poverty I am unable to pay the costs of said cause. That this cause of action has been appealed from the District Court to the Appellate Court for the Second Circuit, where the matter was first tried for violations of the Federal Securities laws. The petitioner since the filing of the initial motion seeking vacation of the judgement below, and the filing of the 'complaint' below, has applied for and received the status in forma pauperis in the District Court and in the Court of Appeals for the Second Circuit, Southern

District of New York, in this matter. The Petitioner had been granted and continues to proceed in forma pauperis in the District Court in ROBERT C. DRUCKER vs. S.E.C., 80 CIV-7214(WK); ROBERT C. DRUCKER vs. U.S., 80CIV62(VLB); and S.E.C. vs. ROBERT DRUCKER, 76 CIV 2643(MEL).

2. -I am unable to give security for the same.

3. -I believe that I am entitled to the redress I seek in this cause.

4. -I am seeking this review in the utmost good faith.

5. -The nature of said cause is briefly stated as follows:

Subsequent to the issuance of an Injunction and sweeping ancillary relief calling for this defendant to disgorge over $200,000 in alleged profits and interest, this petitioner learned that the respondent and the attorneys for the respondent in the investigatory, pre trial and trial stages of this matter, which dates back to 1972, had failed to disclose to the Court in this matter, and/or to the defendant or his counsel Michael Devine after request for discovery, that:-

a) The S.E.C. had suppressed disclosure of evidence, and an affidavit from a S.E.C. witness, which was clearly exculpatory to this petitioner; which demonstrated that the S.E.C. introduced testimony at trial by their witness Lori Rukasin and by Dorothy Drucker, which was clearly false, misleading or perjurious; which was clearly supportive of the direct testimony at trial of this Petitioner;

and which directly bore on the truthfulness and credibility of witness Lori Rukasin and Dorothy Drucker, whom the S.E.C., respondent had called as their witness.

b) That the respondent's witness, Gerald Wolfe, had a 'deal' with the S.E.C. which provided a motive to lie; which bore on his credibility as a witness. The deal involved two benefits to the witness Wolfe:-

1) that he would not be prosecuted for previous perjured testimony

2) immediately after testifying for the S.E.C. he was advised that his license to trade securities had been reinstated (Wolfe swore that he had been advised before testifying that his license had been 'suspended'). This information was not disclosed to the Court or the defendant-Petitioner.

c) That the Respondent's attorneys had offered a material inducement to Petitioner's wife to induce her to testify against the Petitioner and for the respondent. The inducement was that the S.E.C. would 'relieve' her of her exposure to a potential judgement of some $49,000. This inducement was never disclosed to the Petitioner or the Court by the Respondents.

d) That Respondent attorneys had threatened Petitioners counsel(s) Emmanuel Brown, and Thomas D'Allesandro of Wilkie Farr and Gallagher with potent sanctions, and a 2E disbarment proceeding if each did not disclose fully all information sought by the Respondent and their attorney(s), including attorney-client privileged communications, opinion letters, work product, and legal advice offered and sought by this Petitioner. Respondent and their attorneys induced breaches of Petitioner's attorney-client privilege, secretly, without a waiver, and without the knowledge of the Court and/or the Petitioner and his other counsel. This breach, was not disclosed until some 2 years after the (trial and) initial decision in the original matter below. No complete disclosure and discovery to identify the extent of the threats, the breaches, the information transmitted to the S.E.C. in violation of my fourth and fifth amendment rights had ever taken place.

e) Respondent commenced an investigation of the Petitioner, after Petitioner's firm name appeared on a Pre Investigatory "Target" or "HIT" list of firms targeted for elimination as business entities. This list was arbitrarily created, prior to any investigation and represented a class based invidiously discriminatory action by Respondent aimed at the destruction of the rightful business of the Petitioner and his firm. In

furtherance of this class based discrimanatory action, the Respondent and his attorneys and agents and servants, engaged in, among other actions, the previously described actions which violated Petitioners, 4th, 5th, 6th, and 9th amendment Constitutional rights.

FURTHER AFFIANT SAYETH NOT.

PETITIONER, PRO SE DATED: FEB. 25 .1981

ROBERT C. DRUCKER

SWORN TO AND SUBSCRIBED BEFORE ME, AT QUEENS' N.Y.

THIS 25 DAY OF FEBRUARY, 1981.

Notary Public, County of Queens, N.Y.

My Commission Expires:- [illegible] 82

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ROBERT CHARLES DRUCKER

Petitioner

vs.

SECURITIES AND EXCHANGE COMMISSION et al.

Respondents

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES DISTRICT COURT OF APPEALS
FOR THE SECOND CIRCUIT

Petitioner, Robert Charles Drucker, appearing Pro Se, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Second Circuit, dated December 5, 1980, which affirmed an order of the United States District Court for the Southern District of New York issued May 27, 1980, and to reverse the findings of the Court of Appeals

PRECEDING PAGE WAS BLANK

.....

OPINION BELOW

The decision of the Court of Appeals for the Second Circuit dated December 5, 1980, is included in the appendix to this Petition.

.....

JURISDICTION

This Court has jurisdiction pursuant to 42 USC 1984, and 28 USC 1254(1) and 210(c). The decree sought to be reviewed was rendered and entered on December 5, 1980.

.....

QUESTIONS PRESENTED AS TO MOTION TO VACATE JUDGEMENT

1.- Did the Court of Appeals err in denying the Petitioner a full and fair evidentiary hearing, with discovery, thus denying the due process requirements of the Fifth Amendment of the Constitution to the Petitioner, as to the motion to vacate pursuant to Rule 60(B) F.R.C.P.?

2.- Does the application of a one-year statute of limitations under F.R.C.P. Rule 60(b)(2), in actions where allegations of fraud against a government agency, the S.E.C., are involved, result in a denial of Constitutional due process, where the S.E.C. fails to provide full and fair disclosure of evidence in its sole possession, which goes to the credibility of witnesses it presents at trial, and reflects material evidence in its possession favorable to the defendant-petitioner which bears on the innocence or guilt of the defendant-petitioner?

3.- Did the Court err in failing to apply a "Brady" of Jencks Act requirement to the S.E.C. in this action seeking deprivation of Defendant-Petitioners life, liberty and property. In S.E.C. actions seeking injunctive relief and DISGORGEMENT OF MONIES, or other property rights, must not the standards of proof be significantly higher than those previously accepted by this Court? Must not the government disclose all evidence in its possession, upon request, which bears on the credibility of its witnesses, and disclose all exculpatory evidence in its possession which bears on the guilt or innocence of its targets?

4.- Did the Court err in failing to apply the "Clean Hands" doctrine of Equity given the evidence that the S.E.C. had

a)Introduced false, misleading or perjurious testimony by witnesses Lori Rukasin and Dorothy Drucker

b)Withheld disclosure of deals with government witnesses which may have provided motive to lie, in return for testimony favorable to the S.E.C.

c)Violated the common law privileges associated with Drucker's rights to attorney-client privilege as to his former attorney Thomas D'Allesandro, by threatening prosecution and thus inducing breaches of Drucker's attorney-client privilege.

d)Supressed disclosure of material exculpatory evidence, in its sole possession which bore on the reliability and truthfulness of its chief witnesses at trial, Lori Rukasin, Dorothy Drucker, Gerald Wolfe, Stanley Smith, and upon the innocence of defendant-petitioner Drucker.

QUESTIONS PRESENTED AS TO VIOLATION OF DRUCKER'S CIVIL RIGHTS

1.- Did the Court of Appeals err in failing to grant the petitioner a full and fair evidentiary hearing, including discovery, to develop evidence to support his request for relief pursuant to 42 U.S.C. 1983-1986, and 28 U.S.C. 1343?

2.- Did the Court of Appeals err in its finding that "there was no genuine issue as to any material fact" after accepting affidavits from 2 of the 5 named S.E.C. attorney-defendants alleged to have conspired to violate Drucker's civil rights, so that summary judgement could issue in favor of the S.E.C.?

3.- Does the due process and equal privileges and equal immunities clauses of the Fifth Amendment of the Constitution mandate a full and fair hearing in this matter?

STATUTES AND RULES INVOLVED

The due process issues are affected by the Fifth Amendment to the Constitution of the United States:-

> NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITAL, OR OTHERWISE INFAMOUS CRIME UNLESS ON A PRESENTMENT OR INDICTMENT OF A GRAND JURY, EXCEPT IN CASES ARISING IN THE LAND OR NAVAL FORCES, OR IN THE MILITIA, WHEN IN ACTUAL SERVICE IN TIME OF WAR OR PUBLIC DANGER, NOR SHALL ANY PERSON BE SUBJECT FOR THE SAME OFFENSE TO BE TWICE PUT IN JEOPARDY OF LIFE OR LIMB: NOR SHALL BE COMPELLED IN ANY CRIMINAL CASE TO BE A WITNESS AGAINST HIMSELF, NOR BE DEPRIVED OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW: NOR SHALL PRIVATE PROPERTY BE TAKEN FOR PUBLIC USE, WITHOUT JUST COMPENSATION.

Title 42 U.S.C. 1983 states:-

> EVERY PERSON WHO, UNDER COLOR OF ANY STATUTE, ORDINANCE, REGULATION, CUSTOM, OR USAGE, OF ANY STATE OR TERRITORY, SUBJECTS OF CAUSES TO BE SUBJECTED, ANY CITIZEN OF THE UNITED STATES OR OTHER PERSON WITHIN THE JURISDICTION THEREOF TO THE DEPRIVATIN OF ANY RIGHTS, PRIVILEGES OR IMMUNITIES SECURED BY THE CONSTITUTION AND LAWS, SHALL BE LIABLE TO THE PARTY INJURED IN AN ACTION AT LAW, SUIT IN EQUITY, OR OTHER PROPER PROCEEDING FOR REDRESS

Title 42 U.S.C. 1984 states:-

> ALL CASES ARISING UNDER THE PROVISIONS OF THIS ACT IN THE COURTS OF THE UNITED STATES SHALL BE REVIEWABLE BY THE SUPREME COURT OF THE UNITED STATES WITHOUT REGARD TO THE SUM IN CONTROVERSY, UNDER THE SAME PROVISIONS AND REGULATIONS AS ARE PROVIDED BY LAW FOR THE REVIEW OF OTHER CAUSES IN SAID COURT.

Title 42 U.S.C. 1985 states:-

(2) IF TWO OR MORE PERSONS IN ANY STATE OR TERRITORY CONSPIRE TO DETER, BY FORCE INTIMIDATION OR THREAT, ANY PARTY OR WITNESS IN ANY COURT OF THE UNITED STATES FROM ATTENDING SUCH COURT, OR FROM TESTIFYING TO ANY MATTER PENDING THEREIN FREELY, FULLY AND TRUTHFULLY, OR TO INJURE SUCH PARTY IN HIS PERSON OR PROPERTY ON ACCOUNT OF HAVING SO ATTENDED OR TESTIFIED, OR TO INFLUENCE THE VERDICT, PRESENTMENT, OR INDICTMENT OF ANY GRAND JURY OR PETIT JURY, IN ANY SUCH COURT, OR TO INJUR SUCH JUROR IN HIS PERSON OR PROPERTY ON ACCOUNT OF ANY VERDICT, PRESENTMENT OR INDICTMENT LAWFULLY ASSENTED TO BY HIM, OR OF HIS BEING OR HAVING BEEN SUCH JUROR; OR IF TWO OR MORE PERSONS CONSPIRE FOR THE PURPOSE OF IMPEDING, HINDERING OR OBSTRUCTING, OR DEFEATING IN ANY MANNER, THE DUE COURSE OF JUSTICE IN ANY STATE OR TERRITORY, WITH INTENT TO DENY ANY CITIZEN THE EQUAL PROTECTION OF THE LAWS, OR TO INJURE HIM OR HIS PROPERTY FOR LAWFULLY ENFORCING OR ATTEMPTING TO ENFORCE THE RIGHT OF ANY PERSON OR CLASS OF PERSONS, TO THE EQUAL PROTECTION OF THE LAWS:

(3) IF TWO OR MORE PERSONS IN ANY STATE OR TERRITORY CONSPIRE OR GO IN DISGUISE ON THE HIGHWAY OR ON THE PREMISES OF ANOTHER, FOR THE PURPOSE OF DEPRIVING, EITHER DIRECTLY OR INDIRECTLY, ANY PERSON, OR CLASS OF PERSONS OF THE EQUAL PROTECTION OF THE LAWS, OR OF EQUAL PRIVILEGES AND IMMUNITIES UNDER THE LAWS; OR FOR THE PURPOSE OF PREVENTING OR HINDERING THE CONSTITUTED AUTHORITIES OF ANY STATE OR TERRITORY FROM GIVING OR SECURINC TO ALL PERSONS WITHIN SUCH STATE OR TERRITORY THE EQUAL PROTECTIONS OF THE LAWS; OR IF TWO OR MORE PERSONS CONSPIRE TO PREVENT BY FORCE, INTIMIDATION, OR THREAT, ANY CITIZEN WHO IS LAWFULLY ENTITLED TO VOTE, FFOM GIVING HIS SUPPORT OR ADVOCACY IN A LEGAL MANNER, TOWARD OR IN FAVOR OF THE ELECTION OF ANY LAWFULLY QUALIFIED PERSON AS AN ELECTOR FOR PRESIDENT OR VICE PRESICENT, OR AS A MEMBER OF CONGRESS OF THE UNITED STATES; OR TO INJURE ANY CITIZEN IN PERSON OR PROPERTY ON ACCOUNT OF SUCH SUPPORT OF ADVOCACY; IN ANY CASE OF CONSPIRACY SET FORTH IN THIS SECTION, IF ONE OR MORE PERSONS, ENGAGED THEREIN DO, OR CAUSE TO BE DONE, ANY ACT IN FURTHERANCE OF THE OBJECT OF SUCH CONSPIRACY, WHEREBY ANOTHER IS INJURED IN

HIS PERSON OR PROPERTY, OR DEPRIVED OF HAVING AND EXERCISING ANY RIGHT OR PRIVILEGE OF A CITIZEN OF THE UNITED STATES, THE PARTY SO INJURED OR DEPRIVED MAY HAVE AN ACTION FOR THE RECOVERY OF DAMAGES, OCCASIONED BY SUCH INJURY OR DEPRIVATION, AGAINST ONE OR MORE OF THE CONSPIRATORS.

Title 42 U.S.C. 1986 states:-
EVERY PERSON WHO, HAVING KNOWLEDGE THAT ANY OF THE WRONGS CONSPIRED TO BE DONE, AND MENTIONED IN SECTION 1985, OF THIS TITLE, ARE ABOUT TO BE COMMITTED, AND HAVING POWER TO PREVENT OR AID IN PREVENTING THE COMMISSION OF SAME, NEGLECTS AND REFUSES TO DO SO, IF SUCH WRONGFUL ACT BE COMMITTED, SHALL BE LIABLE TO THE PARTY INJURED, OR HIS LEGAL REPRESENTATIVE, FOR ALL DAMAGES CAUSED BY SUCH WRONGFUL ACT, WHICH SUCH PERSON BY REASONABLE DILIGENCE COULD HAVE PREVENTED; AND SUCH DAMAGES MAY BE RECOVERED IN AN ACTION ON THE CASE; ANY ANY NUMBER OF PERSONS GUILTY OF SUCH WRONGFUL NEGLECT OR REFUSAL MAY BE JOINED AS DEFENDANTS IN THE ACTION; AND IF THE DEATH OF ANY PARTY BE CAUSED BY ANY SUCH WRONGFUL ACT AND NEGLECT, THE LEGAL REPRESENTATIVE OF THE DECEASED SHALL HAVE SUCH ACTION THEREFORE, AND MAY RECOVER NOT EXCEEDING $5,000 DAMAGES THEREIN FOR THE BENEFIT OF THE WIDOW OF THE DECEASED, IF THERE BE ONE, AND IF THERE BE NO WIDOW OF THE DECEASED, THEN FOR THE BENEFIT OF THE NEXT OF KIN OF THE DECEASED. EUT NO ACTION UNDER THE PROVISIONS OF THIS SECTION SHALL BE SUSTAINED WHICH IS NOT COMMENCED WITHON ONE YEAR AFTER THE CAUSE OF ACTION HAS ACCRUED.

Title 28 U.S.C. 1343 states:-
THE DISTRICT COURTS SHALL HAVE ORIGINAL JURISDICTION OF ANY CIVIL ACTIONS AUTHORIZED BY LAW TO BE COMMENCED BY ANY PERSON:

(1) TO RECOVER DAMAGES FOR INJURY TO HIS PERSON OR PROPERTY OR BECAUSE OF ANY DEPRIVATION OF ANY RIGHT OR PRIVILEGE OF A CITIZEN OF THE UNITED STATES, BY ANY ACT DONE IN FURTHERANCE OF ANY CONSPIRACY MENTIONED IN SECTION 1985 OF TITLE 42:

(2) TO RECOVER DAMAGES FROM ANY PERSON WHO FAILS TO PREVENT OR AID IN PREVENTING ANY WRONGS MENTIONED IN SECTION 1985 OF TITLE 42 WHICH HE HAD KNOWLEDGE WERE AGOUT TO OCCUR AND POWER TO PREVENT;

(3) TO REDRESS THE DEPRIVATION UNDER COLOR OF STATE LAW, STATUTE, ORDINANCE, REGULATION, CUSTOM OR USAGE, OR ANY RIGHT, PRIVILEGE, OR IMMUNITY SECURED BY THE CONSTITUTION OF THE UNITED STATES OR BY ANY ACT OF CONGRESS PROVIDING FOR EQUAL RIGHTS OF CITIZENS OR OF ALL PERSONS WITHIN THE JURISDICTION OF THE UNITED STATES.

(4) TO RECOVER DAMAGES OR TO SECURE EQUITABLE OR OTHER RELIEF UNDER ANY ACT OF CONGRESS PROVIDING FOR THE PROTECTION OF CIVIL RIGHTS, INCLUDING THE RIGHT TO VOTE.

LAW OF THE STATE OF NEW YORK, CIVIL PRACTICE LAW AND RULE 4503 states:-

(a) CONFIDENTIAL COMMUNICATION PRIVILEGED; NON JUDICIAL PROCEEDINGS. UNLESS THE CLIENT WAIVES THE PRIVILEGE, AN ATTORNEY OR HIS EMPLOYEE, OR ANY PERSON WHO OBTAINS WITHOUT KNOWLEDGE OF THE CLIENT EVIDENCE OF A CONFIDENTIAL COMMUNICATION MADE BETWEEN THE ATTORNEY OR HIS EMPLOYEE AND THE CLIENT IN THE COURSE OF PROFESSIONAL EMPLOYMENT, SHALL NOT DISCLOSE, OR BE ALLOWED TO DISCLOSE SUCH COMMUNICATION, NOR SHALL THE CLIENT BE COMPELLED TO DISCLOSE SUCH COMMUNICATION, IN ANY ACTION, DISCIPLINARY TRIAL OR HEARING, OR ADMINISTRATIVE ACTION, PROCEEDING OR HEARING CONDUCTED BY OR ON BEHALF OF ANY STATE, OR ANY COMMITTEE OR BODY THEREOF. EVIDENCE OF ANY SUCH COMMUNICATION OBTAINED BY ANY SUCH PERSON, AND EVIDENCE RESULTING THEREFROM, SHALL NOT BE DISCLOSED BY ANY STATE, MUNICIPAL OR LOCAL GOVERNMENTAL AGENCY OR BY THE LEGISLATURE OR ANY COMMITTEE OR BODY THEREOF. THE RELATIONSHIP OF AN ATTORNEY AND CLIENT SHALL EXIST BETWEEN A PROFESSIONAL SERVICE ATTORNEY AND CLIENT SHALL EXIST BETWEEN A PROFESSIONAL SERVICE CORPORATION ORGANIZED UNDER ARTICLE 15 OF THE BUSINESS CORPORATION LAW TO PRACTICE AS AN ATTORNEY AND COUNSELOR-AT-LAW AND THE CLIENTS TO WHOM IT RENDERS LEGAL SERVICES.

CODE OF FEDERAL REGULATIONS, 17 C.F.R. 201.11.1
PRODUCTION OF WITNESSES' STATEMENTS-
AFTER A WITNESS CALLED BY THE ATTORNEY FOR THE INTERESTED DIVISION OF THE COMMISSIN HAS GIVEN DIRECT TESTIMONY IN A HEARING, ANY OTHER PARTY MAY REQUEST AND OBTAIN THE PRODUCTION OF ANY STATEMENT, OR PART THEREOF, OF SUCH WITNESS, PERTAINING TO HIS DIRECT TESTIMONY, IN THE POSSESSION OF THE DIVISION, SUBJECT, HOWEVER TO THE LIMITATIONS APPLICABLE TO THE PRODUCTION OF WITNESS STATEMENTS UNDER THE JENCKS ACT, 18 U.S.C. 3500.

CODE OF FEDERAL REGULATIONS, 17 C.F.R. 200.54; CONSTITUTIONAL OBLIGATIONS.

THE MEMBERS OF THIS COMMISSION HAVE UNDERTAKEN IN THEIR OATHS OF OFFICE TO SUPPORT THE FEDERAL CONSTITUTION. INSOFAR AS THE ENACTMENTS OF THE CONGRESS IMPOSE EXECUTIVE DUTIES UPON THE MEMBERS, THEY MUST FAITHFULLY EXECUTE THE LAWS WHICH THEY ARE CHARGED WITH ADMINISTERING. MEMBERS SHALL ALSO CAREFULLY GUARD AGAINST ANY INFRINGEMENT OF THE CONSTITUTIONAL RIGHTS, PRIVILEGES AND IMMUNITIES OF THOSE SUBJECT TO REGULATION BY THIS COMMISSION.

The Fourth Amendment of the United States Constitution states:-
THE RIGHT OF THE PEOPLE TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS, AND EFFECTS, AGAINST UNREASONABLE SEARCHES AND SIEZURES, SHALL NOT BE VIOLATED, AND NO WARRANTS SHALL ISSUE, BUT UPON PROBABLE CAUSE, SUPPORTED BY OATH OR AFFIRMATION, AND PARTICULARLY DESCRIBING THE PLACE TO BE SEARCHED, AND THE PERSONS OR THINGS TO BE SIEZED.

The Ninth Amendment to the United States Constitution states:-
THE ENUMERATION IN THE CONSTITUTION, OF CERTAIN RIGHTS, SHALL NOT BE CONSTRUED TO DENY OR DISPARAGE OTHERS RETAINED BY THE PEOPLE.

STATEMENT OF THE CASE

After a four-day trial in 1975, Judge MacMahon found Robert Drucker and others, to have violated various provisions of the federal securities laws, S.E.C. v COMMONWEALTH CHEMICAL SECURITIES INC. ET AL, 410 F. Supp 1002 (S.D.N.Y. 1976) and granted an injunction and disgorgement order (1976-77) CCH Fed. Sec. L. Rptr. 95, 741. On appeal, the Court affirmed the grant of injunctive relief as to Drucker, but remanded to the district court for correction of mathematical errors in the computation of the amount to be disgorged. S.E.C. v. COMMONWEALTH CHEMICAL SECURITIES INC. 574 F. 2nd. 90 (2Cir. 1978). On remand, the district court in an unpublished opinion recomputed the amount to be disgorged by Drucker and reduced it from $173,475.00 to $126,650.00 plus interest. 74 CIV 1984-LFM (Sept. 27, 1978). Drucker appealed from that decision and the appeal was dismissed with prejudice pursuant to a stipulation between Drucker and the S.E.C., allowing him to pay 10% of his net taxable income for the calendar years 1979 through 1984 in lieu of the sum to be disgorged. No. 79-6042 (2Cir. Feb. 28, 1980). On March 28, 1980, Drucker filed papers with the district court under the caption of S.E.C. v. ROBERT C. DRUCKER 74 CIV 1984 (LFM) which papers are attached in the appendix as APPENDIX B. The relief sought by Drucker was clearly broken down into 2 distinct areas:-

(1) Vacation of the injunction and disgorgement orders based upon newly discovered evidence which demonstrated a pervasive and deliberage fraud, perpetrated upon the defendant-petitioner, which resulted in a deprivation of Drucker's fourth, and fifth amendment rights as guaranteed by the United States Constitution, which denied Drucker a fair trial, and which trial resulted in the denial of Drucker's rights to life, liberty and peoperty. The complained of actions and facts discovered also constituted a fraud upon the court.

(2) Redress for Drucker as a result of a conspiracy by the S.E.c. and at least 5 named attorneys (see Point 9,, Appen. B, Page 2, of Drucker's motion papers filed in the district court on March 28, 1980) including S.E.C. staff attorneys FRANKLIN ORMSTEN, ROBERT BENOWITZ, MICHAEL HARRIS, ROBERT VAN DER WAGG, STEVEN NEWMAN, and others yet unknown, to deprive and violate petitioners rights under the Civil Rights Act statutes Title 42 U.S.C. 1983-1986, and Title 28 U.S.C. 1343.

The facts presented as newly discovered evidence may be summarized as follows:-

(1) Drucker discovered material, exculpatory evidence which was in the sole possession of the S.E.C. prior to the trial, which was never disclosed to the defense as follows:

(a) An affidavit to the S.E.C. from S.E.C. witness Lori Rukasin, Drucker's former sister-in-law, which substantially contradicts her own trial testimony; which also contradicts the sworn testimony at trial of her sister, Drucker's former wife, Dorothy Drucker. The affidavit supports Robert Drucker's testimony at trial and would have demonstrated the 'incredibility' of the S.E.C. key witnesses at trial, Lori Rukasin and Dorothy Drucker.

(b) Plaintiff SEC offered various inducements to several of their key witnesses to testify; these inducements to Gerald Wolfe, and Dorothy Drucker were never disclosed to the court or the defendant-petitioner or his counsel.

(c) The SEC introduced false, misleading and possibly perjurious testimony at trial, having in its possession a sworn affidavit contradicting S.E.C. elicited testimony (see Lori Rukasin and Dorothy Drucker's testimony) at trial.

(d) Plaintiff SEC gave false assurance to the district court, which assurances were heavily relied on by the district court and the court of appeals, in affirming disgorgement amounts, which were totally unreliable. The deprivation of Drucker's property rights were based upon these unreliable charts. The validity of the charts was questioned in a later trial and the preparer S.E.C. analyst admitted that the totally revised charts (accepted by the court on remand order dated Sept. 27, 1978) might still contain errors (see US v. Drucker).

(e) Plaintiff SEC, through their attorneys, threatened pressured, coerced, various Drucker attorneys, including Thomas D'Allesandro, prior to the initiation of the litigation, to disclose various attorney-client privileged communications, secrets and confidences of the client Drucker. The induced breaches were not disclosed to the client or the court. (see Appendix B, exhibit D-14, Declaration of Thomas D'Allesandro).

The Court of Appeals issued a decision on December 5, 1980, in which it denied defendant-petitioner's request for vacation of the injunction as either being "time-barred" or "unsupported by the 'new' evidence." As to the request for relief for the pro se "complaint" as to civil rights violations, the court did not require a hearing based upon the complaint, but treated the S.E.C. response in opposition to Drucker's "motion" as a motion for summary judgement. The Court of Appeals granted the S.E.C. motion for "summary judgement" as to the allegations of civil rights act violations based upon its finding that "WE CAN FIND NO GENUINE ISSUE AS TO ANY MATERIAL FACT."

On January 2, 1981, Drucker filed a motion with the Court of Appeals seeking an extension of time to allow for late filing of a motion seeking a rehearing or reconsideration of the decision of the Court of Appeals, citing the doctrine of estoppel in pais and Supreme Court case law on the points dealing with the district court's adherence to the statute of limitations, and the Appellate Court's affirmance of the time-barring nature of the statute in denying Drucker the requested hearing(s) or relief. On January 22, 1981, the Court of Appeals granted the motion to the extent that the petition was accepted for filing "out of time" but denied the petition for a rehearing.

POINT I

The application of a one-year statute of limitation under Rule 60(b)(2) denies the petitioner a fair trial and substantive due process under the fifth amendment of the United States Constitution.

When the action of a governmental agency results in the knowing suppression of evidence favorable to an accused, the application of a 1-year statute of limitations under F.R.C.P. Rule 60(b)(2) denies due process to the petitioner. Fairness dictates that, when it is the government which stands accused of fraud and deceipt, which causes an 'unfair' trial in the constitutional sense, the application of a rigid 1-year statute of limitations violates the rights of this petitioner to procedural and substantive due process and thus violates the petitioner's fifth amendment rights. Drucker petitioned the Court of Appeals for reconsideration and a rehearing on this point citing the Supreme Court's doctrine of Equitable Estoppel In Pais (see GLUS v Brooklyn East. Term. 359 US 231,232,233, 79 Sct. 760,762, 3 L Ed2nd 770(1959), where the Court stated:-

"TO DECIDE THE CASE WE NEED LOOK NO FURTHER THAN THE MAXIM THAT NO MAN MAY TAKE ADVANTAGE OF HIS OWN WRONG. DEEPLY ROOTED IN OUR JURISPRIDENCE THIS PRINCIPLE HAS BEEN APPLIED IN MANY DIVERSE CLASSES OF CASES BY BOTH LAW AND EQUITY AND HAS FREQUENTLY BEEN EMPLOYED TO BAR INEQUITABLE RELIANCE ON STATUTES OF LIMITATIONS."

The Court in GENERAL STENCILS INC. vs CHAIPPA, 18 NY2nd 125, 272 NYS 2nd. 337, in considering the existence and application of such principle in that matter stated:-

> "Plaintiff does not argue that the statute has been tolled or that the cause of action did not accrue until discovery, but rather that the doctrine of equitable estoppel should be applied because of defendant's affirmative wrongdoing and concealment--to prevent defendant from asserting the Statute of Limitations. The principle that a wrongdoer should not be able to take refuge behind the shield of his own wrong is a truism."

In ERBE vs LINCOLN ROCHESTER TRUST COMPANY, 13 A.D. 2nd 211, 214 NYS 2nd 849, 852, the Court similarly held as follows:

> "It is a familiar principle that, when a defendant electing to set up the statute of limitations has previously by deception or any violation of duty towards plaintiff, caused him to subject his claim to the statuatory bar, he must be charged with having wrongfully obtained an advantage which the court will not allow him to hold." 53 C.J.S. Limitations of Actions 25, pp. 963-964. See also annotation 77 A.L.R. 1044; 130 A.L.R. 8; 15 A.L.R. 2nd. 500; 24 A.L.R. 2nd 1413; Dawson, Estoppel and Statutes of Limitations, 31 Mich. L.R. 875; Dawson, Undiscovered Fraud and Statutes of Limitations, 31 MICH. L.R. 591; Developments in the Law--Statutes of Limitations, 63 Harvard L.R., 1177, 1222-1224.

POINT II

> In actions where the S.E.C. seeks substantial ancillary relief, as in this case disgorgement of vast sums of monies, the standard of proof required by the S.E.C. should be significantly greater than the present standard and should reach the level of "beyond a reasonable doubt" as in criminal cases. When Life, Liberty and Property rights are at stake then the normal standard which are applied in actions only seeking an injunction, are insufficient to comply with the Due Process requirements of the Fifth Amendment of the Constitution. In such actions, the responsibility of the S.E.C. and the fiduciary obligations of the S.E.C. are to make full and fair and complete disclosure of all evidence in their possession (to comply with the obligations described by this Court in Brady vs. Maryland) which is exculpatory in nature or which tends to negate the guilt of the target, upon request. Failure to provide such information, upon request, results in a deprivation of the 5th and 6th amendment rights of the injunctive target to a fair trial.

The Plaintiff S.E.C. and their attorney(s) witheld exculpatory information, in their sole possession and control, from the defendant Drucker and his counsel, Michael Devine Esq. The suppression of such exculpatory evidence, which was requested by the defendant's counsel, and which bore on the credibility of key S.E.C. witnesses presented at trial, caused Drucker to receive an unfair trial and an unjust decision in favor of the S.E.C. The secreting of deals with S.E.C. witnesses who did testify at trial for the S.E.C., and the failure to advise the Court or the defendant of his counsel of such 'deals' constituted a breach of the fiduciary obligation of the S.E.C. and failed to provide the trier of the facts with all the facts with which to reach a decision on the demeaner and integrity of

the testimony before the Court. The existence of a sworn affidavit from an S.E.C. witnesses which contradicts the testimony of that witness and other S.E.C. witnesses at trial, in the sole possession of the S.E.C., which were concealed for years after the conclusion of the trial, is a direct violation of Drucker's fifth and sixth amendment rights to a fair trial.

Findings of fact and disgorgement orders were handed down by the District Court, and affirmed by the Court of Appeals, ordering disgorgement in the HUNDREDS OF THOUSANDS OF DOLLARS by this defendant as a result of the deceipt of the S.E.C. and the sham of a trial caused by such actions. The use of a negligence standard in S.E.C. injunctive actions has been dealt with by this Court in AARON vs S.E.C., Docket No.79-66, June 2, 1980. The defendant in the Commonwealth matter were enjoined using a negligence standard which this Court has now put to the side by its decision in AARON.

The petitioner believes that this case may further clarify the necessity in INJUNCTIVE ACTIONS SEEKING DISGORGEMENT OR OTHER ANCILLARY RELIEF INVOLVING LIFE, LIBERTY OR PROPERTY RIGHTS, for having a much higher standard of proof that they enunciated in AARON. Clearly, the S.E.C. has the choice in bringing an injunctive action to:-

1) Comply with AARON if ONLY an injunction is sought
2) Comply with a higher standard of proof and with a BRADY obligation <u>if ancillary relief is sought in addition.</u>

The S.E.C. would be free to prosecute actions seeking ONLY injunctive relief in compliance with the Court's guidelines in AARON. If the S.E.C. did elect to seek monetary recovery, disgorgement, or other relief which is clearly associated with property rights, or those of life, liberty and property, then the standard of proof, and the disclosure requirements must be as stringent as if the case were in fact a criminal case.

Surely, a disgorgement order arising out of an injunctive proceeding for a violation of 10(b)(5) in an amount of more than $200,000 is no less onerous or more of a penalty that being convicted of some 'crime' which carries a 30-day jail sentence, or probation.

POINT III

> The petitioner stated a claim for relief pursuant to the statutes of title 42 U.S.C. 1983-1986, and under Title 28 U.S.C. 1343. Failure of the District Court and the Court of Appeals to grant a full and fair hearing, with discovery, denies petitioner procedural and substantive due process as required by the fifth amendment of the Constitution.

The petitioner stated a claim under Title 42 U.S.C. 1983-1986, based upon an allegation of a class based, invidiously discriminatory conspiracy by the S.E.C. and at least 5 named S.E.C. attorney(s) who petitioner believes were acting as co-conspirators in actions which did in fact deprive defendant-petitioner of various 4th, 5th and sixth amendment

Constitutional rights and privileges. The petitioner's allegations of a class based, invidiously discriminatory action, involving the creation of a pre-targeted 'hit' list, prior to any investigation or facts indicating violations of law by this defendant or other class members, HAS NOT BEEN DENIED by the S.E.C. The S.E.C. presented 2 affidavits from 2 of the alleged co-conspirators which failed to respond to each and every allegation or statement of fact charged against the co-conspirators. The affidavits were self serving and conclusory, and not factually responsive to the allegations or charges in the petitioner's 'complaint'. No denials were presented from the 3 other attorney-alleged co-conspirators, or from the S.E.C. itself.

The District Court and the Court of Appeals failed to provide, as described in the law, a full and fair evidentiary hearing with discovery, as a prerequisite for a decision and findings. The denial of a hearing and discovery, after having stated a substantial claim, are and were a denial of procedural and substantive due process to this defendant-petitioner appearing Pro Se. Given the substantial nature of the claim and the facts, affidavits, and evidence in support of said claim, and the financial inability of the petitioner Pro Se to retain effective counsel, the court(s) erred in failing to provide counsel as provided in title 42 U.S.C. SECTION 1983 note 530(b)

HOW A FEDERAL QUESTION IS PRESENTED

The petitioner appeals from the decision and findings of the Court of Appeals for the Second Circuit based upon:-

1.- The denial of a full and fair evidentiary hearing based upon the alleged violations of Petitioner's civil rights as authorized by the Civil Rights Act statutes, 42 U.S.A. 1983-1986.

2.- The application of a time barring statute of limitations by the District Court and the Court of Appeals in contradiction of the Supreme Court's holding in GLUS vs BROOKLYN EASTERN TERM. Supra, to deny Petitioner a hearing and other relief in seeking the vacation of the original judgement.

3.- The failure to remedy the taking of Petitioner's life, Liberty and Property rights, without a FAIR trial in violation of Petitioner's Fifth Amendment rights as guaranteed by the Constitution.

4.- The need to clarify the rights and obligations of Respondent towards Petitioner, and other adversaries of the Respondent S.E.C. in injunctive actions, as to the standard of proof when ancillary relief in addition to injunctive relief is sought. Is there, should there have been, a

Brady of Jenck's Act obligation upon the Respondent S.E.C. in injunctive actions seeking other ancillary relief? Does the failure to comply with Brady of Jenck's Act requirements, result in such inherent unfairness as to require remedial action by the Court, and a denial of procedural and substantive due process rights of this Petitioner?

All of the above points involve major, important, unanswered legal questions which are of a Federal nature, and for which this Petitioner, appearing Pro Se, respectfully requests the assistance and guidance of this Court, so that this Petition requesting Certiorari may be considered and granted.

REASONS FOR GRANTING THIS WRIT

The proliferation of injunctive actions by the S.E.C. seeking ancillary relief continues. The standard of proof in injunctive actions has been gradually strengthened by this Court through decisions in Ernst and Ernst vs Hochfelder and by Aaron vs SEC. The Court has not addressed the standard of proof in injunctive actions where substantial property rights are involved. In this action, the S.E.C., relying on a negligence standard, received the sought-after injunctive relief, and an order of the Court for disgorgement of profits amounting to more than $200,000 from this defendant (including principal and accumulated interest), and more than $600,000 from all of the defendants together. This disgorgement order

was not based upon full disclosure to the defendant-Petitioner of all exculpatory evidence in the possession of the Respondent-S.E.C., upon request. The Court and the defendant-Petitioner and his counsel, were deceived by the Respondent's suppression of exculpatory evidence, in the sole possession of Respondent, dealing with the facts at issues, the credibility of at least 4 of Respondent's key trial witnesses, and the extent of guilt or innocence of the Petitioner. The denial of this full and fair disclosure, upon request, denies defendant-Petitioner his Fifth Amendment Constitutional rights.

The Court of Appeals, in a Civil Rights Act suit under statutes 42 U.S.C. 1983-1986, cannot fairly state that there is no remaining genuine issue of fact when the Respondent does not deny Petitioner's allegations of a class-based, invidiously discrimanatory action against this and other Petitioner, and presents no response from at least 3 of the alleged co-conspirator attorneys who were employees of the S.E.C. and involved in the allegedly violative activities. The purpose of the Petitioner's complaint was not to try all issues on the Pro Se's papers, which were presented with the accompanying motion papers, but to state a claim upon which the Court would and could order a full and fair evidentiary hearing and full disclosure and discovery. The denial of such a full and fair hearing has resulted in the Petitioner Pro Se being denied his Constitutional rights as described in the fifth, sixth and ninth amendments. The necessary importance of clarification of

the legal rights of the Petitioner, the Respondent and all other future S.E.C. injunctive targets requires that this Court more clearly define the scope of responsibilities and obligations of prosecutors and representatives of Respondent when they litigate in Federal Courts seeking BOTH INJUNCTIVE AND ANCILLARY RELIEF.

The Petitioner respectfully requests the Court consider and grant the appointment of counsel so that these important and timely issues may be fully and fairly presented to this Court.

CONCLUSION

For the above-cited reasons, petitioner prays that this Court issue a Writ of Certiorari to the Court of Appeals for the Second Circuit, of the Southern District of New York, and reverse its judgement and decision.

RESPECTFULLY SUBMITTED

DATED- February 26, 1981

ROBERT C. DRUCKER, pro se
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* * *

United States Court of Appeals

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the Fifth day of December , one thousand nine hundred and Eighty

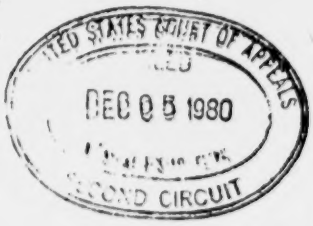
Present:

HONORABLE HENRY J. FRIENDLY

HONORABLE WALTER R. MANSFIELD

HONORABLE JAMES L. OAKES

Circuit Judges.



SECURITIES AND EXCHANGE COMMISSION,
Plaintiff-Appellee,
v.
COMMONWEALTH CHEMICAL SECURITIES, INC.,
Defendants,
ROBERT DRUCKER,
Defendant-Appellant.

80-6121

Robert Drucker, appearing pro se, appeals from an order issued on May 27, 1980, by the District Court for the Southern District of New York, Lloyd F. MacMahon, Chief Judge, denying his motion to vacate a final judgment of that court. The final judgment, which had been entered on September 27, 1978, permanently enjoined Drucker from violating certain provisions of the federal securities laws and ordered him to disgorge profits resulting from his past violations.

This case has had a long history and our brief recounting will focus only on Drucker's role. After a four-day trial in 1975, Judge MacMahon found Drucker and others to have violated various provisions of the federal securities laws, SEC v. Commonwealth Chemical Securities, Inc., 410 F.Supp. 1002 (S.D.N.Y. 1976), and granted an injunction and disgorgement order. [1976-1977] CCH Fed. Sec. L. Rptr. ¶95,741. On appeal, this court affirmed the grant of injunctive relief as to Drucker, but remanded to the district court for correction of errors in the computation of the amount to be disgorged. SEC v. Commonwealth Chemical Securities, Inc., 574 F.2d 90 (2 Cir. 1978). On remand, the district court in an unpublished opinion recomputed the amount to be disgorged by Drucker and reduced it from $173,475.00 to $126,650.00, plus interest. 74 Civ. 1984-LFM

Petitioners Appendix
[A7]

(Sept. 27, 1978). Drucker's appeal from this decision was dismissed with prejudice pursuant to a stipulation between Drucker and the Securities Exchange Commission (SEC or the Commission) allowing him to pay ten percent of his net taxable income for the calendar years 1979 through 1984 in lieu of the sum to be disgorged. No. 79-6042 (2 Cir. Feb. 28, 1980). On March 28, 1980, Drucker filed the motion with which we are here concerned, seeking to vacate the amended judgment and order that had been entered by the district court eighteen months before. Drucker claimed to have discovered new evidence demonstrating, inter alia, fraud and misconduct by the Commission, perjury by the witnesses against him at the trial, and fraud upon the court. The trial judge denied the motion on the ground that the new evidence, "even if accepted at face value", revealed only "minor inconsistencies" and also on the ground that the motion, which he read as falling within Fed. R. Civ. P. 60(b)(2) and (3), was untimely since it was made more than a year after the judgment had been entered.

We agree with the result reached by the district court but, in some respects, on different grounds. Insofar as the acts alleged would constitute frauds upon the court, the motion was not barred by the time limit of one year applicable to motions under Rule 60(b)(2) and (3). See 7 Moore's Federal Practice ¶60.33 at 509 (2d ed. 1979). However, most of the foul play alleged by Drucker -- perjured testimony (given without the complicity of the SEC), breaches of the attorney-client privilege induced by SEC staff attorneys, undisclosed promises to witnesses offered in exchange for truthful testimony, while not to be condoned, does not rise to the level of fraud upon the court. As for the claims that the SEC knowingly offered false charts and perjured testimony by the teenage sister of Drucker's former wife, we find these to be without any merit whatsoever. In short, we have examined with care Drucker's numerous charges of SEC improprieties and conclude that all such allegations are either time-barred or unsupported by the "new" evidence. And we perceive no abuse of discretion in the district court's decision to hear this motion solely on affidavits, rather than wholly or partially on direct testimony. See Fed. R. Civ. P. 43(e); 7 Moore's Federal Practice, supra, ¶60.28[3], at 410-12.

The papers filed with the district court also included claims for damages and declaratory and injunctive relief against the Commission, under 42 U.S.C. §§1983-1986, for alleged deprivations of Drucker's constitutional rights. The acts complained of were the same as those relied upon in the Rule 60(b) motion. The district court thought these claims dependent upon the motion to vacate the judgment, and denied any relief. Construing this "complaint" liberally in light

of Drucker's pro se status, we nevertheless think it apparent that most of the allegations, even if true, would not amount to constitutional violations. We need not consider whether the more serious charges have a constitutional dimension, since the evidence presented in support of them is wholly inadequate. Here, again, there was no error in the district court's denial of Drucker's "complaint" without a hearing; treating the SEC's response in opposition to Drucker's motion as a motion for summary judgment, we can find no genuine issue as to any material fact. See Fed. R. Civ. P. 56(c).

The order of the district court is affirmed.

HENRY J. FRIENDLY

WALTER R. MANSFIELD

JAMES L. OAKES

Circuit Judges

PRO SE

UNITED STATES COURT OF APPEALS

80-6121
1/16/81

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-second day of January , one thousand nine hundred and Eighty-One.

Securities & Exchange Commission,

Plaintiff-Appellee,

v.

Commonwealth Chemical Securities, Inc.,

Defendants,

Robert Drucker,

Defendant-Appellant.

UNITED STATES COURT OF APPEALS
JAN 23 1981
SECOND CIRCUIT

80-6121

A motion having been made herein by ~~relator~~ Appellant pro se ~~for reconsideration of the denial of the application for counsel and for~~

~~an order directing the Clerk of the United States District Court for the Southern District of New York to forward the appendix~~

~~to the record on appeal~~ and for

~~RH~~ REHEARING

Upon consideration thereof, it is

Ordered that said motion be and it hereby is granted to the extent that the petition for rehearing may be filed out of time. The petition for rehearing is denied.

Henry J. Friendly (per WRM)
Walter R. Mansfield, Circuit Judges
James L. Oakes, Circuit Judges

WRM JLO HJF

Petitioners Appendix
[B]